Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1569

ARIZONA PUBLIC SERVICE COMPANY, a corporation,

Appellant,

vs.

THE STATE OF ARIZONA; ERNEST A. GARFIELD, STATE TREASURER OF ARIZONA; STATE TAX COMMISSION OF ARIZONA and WALDO DeWITT, JOHN HAZELETT and ROBERT KENNEDY, MEMBERS OF AND CONSTITUTING STATE TAX COMMISSION OF ARIZONA; APACHE COUNTY; LaVERE O. CONNOLLY, TREASURER OF APACHE COUNTY; COCHISE COUNTY; F. C. ALEXANDER, TREASURER OF COCHISE COUNTY; COCONINO COUNTY; ROSE STACY, TREASURER OF COCONINO COUNTY; GILA COUNTY; ROY WOOD, TREASURER OF GILA COUNTY; GRAHAM COUNTY; LOLA HUBBARD, TREASURER OF GRAHAM COUNTY; MARICOPA COUNTY; HAROLD D. LAFFERTY, TREASURER OF MARICOPA COUNTY; MOHAVE COUNTY; RUTH O. MOSER, TREASURER OF MOHAVE COUNTY; NAVAJO COUNTY; RAYMOND H. RANDALL, TREASURER OF NAVAJO COUNTY; PIMA COUNTY; JAMES LEE KIRK, TREASURER OF PIMA COUNTY; PINAL COUNTY; ALICE M. DIFFIN, TREASURER OF PINAL COUNTY; YAVAPAI COUNTY; PAUL J. WEDEPOHL, TREASURER OF YAVAPAI COUNTY; YUMA COUNTY; ROBERT E. LEE, TREASURER OF YUMA COUNTY,

Appellees,

ON APPEAL FROM SUPREME COURT OF ARIZONA

MOTION TO DISMISS AND BRIEF IN SUPPORT OF MOTION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-1569

ARIZONA PUBLIC SERVICE COMPANY,
a corporation,

Appellant,

vs.

THE STATE OF ARIZONA, et al.,

Appellees.

MOTION TO DISMISS AND BRIEF
IN SUPPORT OF MOTION

The Appellees move the Court to dismiss the appeal on the grounds that: (1) the appeal was not taken in conformity with the applicable statutes and Rules of the United States Supreme Court; (2) the judgment rests on an adequate non federal basis; and (3) the appeal does not present a substantial federal question.

STATEMENT OF THE CASE

Arizona Public Service Company filed a complaint in the Superior Court of Maricopa County for the refund of $1,789,894.39 paid in property taxes in respect to the year 1970. The theory of the Arizona Public Service Company suit was that two items in the State's General Appropriation Act for fiscal year 1970[1/]

1/ The 1970 General Appropriation Act provided in the pertinent parts as follows:

AN ACT RELATING TO APPROPRIATIONS FOR THE DIFFERENT DEPARTMENTS OF THE STATE, FOR STATE INSTITUTIONS, AND FOR PUBLIC SCHOOLS.

. . .

Section 1. Subject to applicable laws, the sums or sources of revenue herein set forth are appropriated for the fiscal year beginning July 1, 1970, for the purposes and objects herein specified:

Subdivision 104.	CAPITAL OUTLAY STABILIZATION FUND	$12,000,000.00
Subdivision 105.	OPERATING RESERVE	$20,000,000.00

Session Laws of 1970, Chapter 162.

were unconstitutional under various provisions of the Arizona Constitution and the Equal Protection Clause of the United States Constitution and it therefore necessarily followed that the State tax rate was pro tanto unconstitutional and that the levy based on that rate was therefore unconstitutional.

The State filed a motion for judgment on the pleadings on the theory that the complaint failed to state a cause of action because the standard under Arizona law for determining the legality of a tax levy is whether the rate was so grossly excessive as to show it was arbitrary or fraudulent and that the Arizona Public Service Company complaint did not contain any such allegations. The Superior Court judge denied the motion of the State of Arizona for judgment on the pleadings.

Arizona Public Service Company filed a motion for summary judgment and the State of Ariozna thereafter filed its cross-motion for summary judgment. Arizona Public Service Company contended that the function of setting the tax rate was partly ministerial and partly discretionary. The The Superior Court granted the motion for summary judgment of Arizona Public Service Company. The Superior Court judge made findings of fact and conclusions of law in which he concluded that the complaint of Arizona Public Service Company stated a cause of action; the appropriation of the Legislation violated several provisions of the Arizona Constitution and that Arizona Public Service company was entitled to judgment on its complaint in the amount of $1,786,547.83. The judge expressly declined to rule on the constitutional question involving the Equal Protection Clause because the point was neither argued nor briefed.

The State appealed this judgment of the Superior Court to the Arizona Court of Appeals. The Arizona Court of Appeals reversed the decision of the Superior Court and remanded the case with directions to enter judgment in favor of the State. The Court of Appeals reversed on the basis of the holding in Cochise County v. Southern Pacific, 99 Ariz. 385, 409 P.2d 549 (1966), that in carrying out its tax setting power the Tax Commission had acted judicially and cannot be attacked in the absence of a showing that it acted in bad faith or so arbitrarily as to amount to constructive fraud. Arizona Public Service Company made a motion for rehearing which raised the federal constitutional question that is the subject of this appeal for the first time and that motion

was denied. On December 16, 1975 Arizona Public Service Company's Petition for Review to the Arizona Supreme Court was denied.

On December 19, 1975, Arizona Public Service Company filed a motion in the Arizona Court of Appeals entitled "Motion For The Mandate Of The Court To Permit Amendment Of The Complaint". By this motion Arizona Public Service Company sought to amend its complaint to allege for the first time that the tax rate resulting from the two appropriation items was so excessive as to be fraudulent and arbitrary. On January 30, 1976, the "Motion For The Mandate Of The Court To Permit Amendment Of The Complaint" was denied.

The mandate of the Court of Appeals was issued on February 9, 1976.

Pursuant to the mandate of the Court of Appeals, the Superior Court entered a judgment in favor of the State of Arizona and ordered its prior judgment vacated. On April 14, 1976, Arizona Public Service Company filed the notice of appeal to the United States Supreme Court. The notice of appeal stated that it was from the final judgment of the Superior Court of the State of Arizona for Maricopa County dated February 23, 1976 entered March 4, 1976 pursuant to the mandate of the Court of Appeals of the State of Arizona, Division One issued February 9, 1976 after denial of review by the Supreme Court of the State of Arizona on December 16, 1975.

SUMMARY OF ARGUMENT

This motion to dismiss is based on three grounds. First, this appeal

was not taken in conformity with the applicable statutes. Under the provisions of 28 U.S.C. 2101(c), the appeal should have been filed within ninety (90) days after the State court decision became final. This appeal was not filed within that time limit. Secondly, the decision of the Arizona Court of Appeals rests upon an adequate non federal basis. When a property tax assessment is challenged on the ground of some irregularity in the setting of the tax rate, the tax is not illegal unless the rate is so grossly excessive as to indicate that it is arbitrary or fraudulent. This case was decided on the basis of that rule of law. Regardless of whether this is characterized as a rule defining a cause of action or a burden of proof rule, it is a question of state law. Thirdly, since the issue in this case

is really a question of the scope of a cause of action or a question of burden of proof rather than a question of the scope of the remedial statute, A.R.S. § 42-204, there is really no question of the constitutionality of a state statute and there is no due process question in this case. Therefore, this appeal does not present a substantial federal question.

ARGUMENT

A. APPEAL NOT TAKEN IN CONFORMITY WITH APPLICABLE STATUTES

The time for taking this appeal began to run from the denial of the Petition for Review on December 16, 1975. Under the provisions of 28 U.S.C. 2101(c), Arizona Public Service Company had ninety (90) days within which to file its Notice of Appeal to the United States Supreme

Court. The appeal period did not begin to run from the Arizona Court of Appeal's denial of the Motion For The Mandate Of The Court To Permit Amendment Of The Complaint because the ruling on Arizona Public Service Company's federal constitutional challenge became final on December 16, 1975. The late motion and its subsequent denial did not raise any federal constitutional question. Moreover, Arizona Public Service Company is not appealing the denial of that motion. (See page 15 of Appellant's Jurisdictional Statement)

The appeal period does not run from the issuance of the mandate of the Court of Appeals or from the Superior Court judgment because they are simply ministerial acts. For the purposes of the ninety (90) day period, the test of finality is whether the order of the

appellate court has fully adjudicated rights and that adjudication is not subject to further review by a state court. Where the order or judgment is final in that sense, the time for applying to the Supreme Court of the United States runs from the date of the appellate court's order because the object of the statutes is to limit the applicant's time to three months from the date when finality of judgment for purpose of review is established. Department of Banking v. Pink, 317 U.S. 264 (1942); Cole v. Violette, 319 U.S. 581 (1943). Since the issuance of the mandate and the Superior Court judgment did not present any further opportunity for court review, they were merely ministerial acts for the purposes of 28 U.S.C. 2101(c) and the decision was final on December 16, 1975 when the

Petition for Review was denied. Since the Notice of Appeal was not filed until April 14, 1976 which was more than ninety (90) days after December 16, 1975, Arizona Public Service Company has not complied with the provisions of 28 U.S.C. 2101(c) which requires the filing of the Notice of Appeal within ninety (90) days.

B. JUDGMENT RESTS ON AN ADEQUATE NON FEDERAL BASIS

This case involves a tax appeal problem. Under Arizona law the legality of a tax may be challenged on the ground that an exemption is applicable, the tax is discriminatory, the property is not located in the jurisdiction imposing the tax, or numerous other grounds. The legality of a tax is seldomly challenged on the ground that the tax is illegal because of some irregularity

in the setting of the tax rate or in the General Appropriations Act. For cases of this type, the test usually applied is to determine whether the tax levy is so grossly excessive as to constitute a constructive fraud on the taxpayers. Rogge v. Petroleum County, 107 Mont. 36, 80 P.2d 380 (1938).

From the decision in Cochise County v. Southern Pacific Company, 99 Ariz. 385, 409 P.2d 549 (1966), and the decision of the Court of Appeals in this case, it is clear that Arizona follows the general rule. The rationale of this rule is found in the Court decisions. Taxing authorities must anticipate as nearly as they can the amount of money necessary for operating their political subdivision and arrange to have funds ready to meet obligations when due. People v. Chicago Burlington

& Quincy R.R., 8 Ill.2d 382, 134 N.E.2d 335 (1956). A proper rate of tax to produce the amount required is a matter which must rest largely within the discretion of the officials levying the taxes since it is uncertain what deficiencies in collection will amount to. People v. Wabash Ry., 296 Ill. 527, 129 N.E. 826 (1921). The mere circumstance that in estimating in advance the amount necessary for any purpose a larger amount is levied than is actually required affords the taxpayer no ground for objection unless the amount levied is so grossly excessive to show a fraudulent purpose. People v. Chicago and N.W.R.R., 397 Ill. 266, 73 N.E.2d 418 (1947).

This case was decided on the basis of the Arizona Supreme Court decision

in Cochise County v. Southern Pacific Company, supra. The rule of this case that one challenging a tax on the ground of irregularity in setting the tax rate must show the levy to be so excessive as to indicate it is arbitrary or fraudulent in order to be entitled to relief is a matter of state law. When all of the circumstances of the tax rate setting function are considered the rule is equitable, just and practical. The salutary purpose of this rule is to avoid overwhelming the courts with litigation which would ultimately be inconsequential in its effect. Except for the size of its property holdings, Arizona Public Service Company is in the same position in this matter as all of the other property taxpayers in the state.

It has not suffered any damage which distinguishes it from them.

Setting the tax rate is and necessarily must be a discretionary function. The court can take judicial notice of the fact that it is unlikely that anyone who has the responsibility for setting a tax rate to balance a budget involving hundreds of millions of dollars of revenue is going to be able to estimate precisely a year in advance the exact amount required to balance the budget. Since the judgment rests on this independent and adequate non federal ground, the Supreme Court does not have jurisdiction. Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487 (1965). The case should be dismissed for this reason alone.

C. APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

This case really deals with a definition of a cause of action rule or a burden of proof rule rather than a question of procedural due process. In any event it does not involve the constitutionality of A.R.S. § 42-204. That statute provides that the remedy for an illegally collected tax is a suit in the superior court. That statute does not undertake to define illegally collected taxes. What constitutes an illegally collected tax has to be decided by reference to other statutes and the common law rather than by statutory construction of A.R.S. § 42-204. This appeal was filed under 28 U.S.C. 1257(2) according to the Notice of Appeal. Since the decision of the Arizona Court of

Appeals did not and could not reasonably be considered to have involved the constitutionality of A.R.S. § 42-204 or any other state statute, the Supreme Court does not have jurisdiction of this matter under 28 U.S.C. 1257(2).

An additional reason why this case involves no substantial federal question appears from a reading of the Court of Appeals' opinion. The recent history of the setting of tax rates in Arizona which is set out in the opinion of the Court of Appeals suggests that the change in the setting of the tax rate was more a matter of form than of substance. It was simply a division of responsibilities between the Legislature and the Tax Commission for the year 1970, whereas, previously the Tax Commission had handled the

entire task of setting the tax rate by itself. That circumstance and the comparison of surplus carryovers with the preceding years suggests that there probably would not have been any substantial change in the tax rate if the procedure had not been changed in 1970. However, if the tax rate were different because of what happened, Arizona Public Service Company received the benefit of a lower tax rate in the following year because of the surplus carryover. Since Arizona Public Service Company had the full opportunity to be heard and had the claims adjudicated by Arizona courts, its failure to properly allege that the tax rate resulting from the two appropriation items was so excessive as to be fraudulent and arbitrary cannot now

give rise to a violation of procedural due process. Arizona Public Service Company certainly was not deprived of any remedy. There is no due process question in this case. Because of the lack of a substantial federal question, the case should be dismissed. Abrams v. Van Schaick, 293 U.S. 188 (1934).

Moreover, Arizona Public Service Company could have availed itself of the remedy under A.R.S. §§ 35-212 and 35-213.[2/] If these statutes were utilized the net effect of an unconstitutional appropriation would be that

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2/ A.R.S. §35-212. Injunctive and civil remedies.

The attorney general, under appropriate circumstances, shall bring an action in the name of the state to enjoin the illegal payment of state money, or if the money has been paid, to recover such money plus twenty per cent of such amount and interest and costs to be paid into the state treasury to the credit of the fund from which the payment was made.

the taxpayer who successfully challenged the appropriation would have paid his taxes a year earlier than he might otherwise. The sums that the state was enjoined from spending under these statutes or that were recovered would go into the general fund of the state resulting in an increase in the surplus carried over to the next year and a corresponding reduction in next year's tax levy. That remedy is

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2/ cont'd.

A.R.S. §35-213. Failure of attorney general to bring action; action by taxpayer; bond; amount of recovery and attorney fees.

A. If for sixty days after request made by a taxpayer of the state in writing, the attorney general fails to institute an action as provided in § 35-212, any taxpayer of the state may institute the action in his own name and at his own cost with the same effect as if brought by the attorney general.

B. The person instituting the action shall execute a bond payable to the defendant in the action, conditioned that the plaintiff will prosecute the action with diligence and finality or will pay all damages sustained by the defendant by reason of the action and all costs incurred therein.

certainly sufficient to satify the requirements of due process. Procedural due process only requires notice and an opportunity to be heard and Arizona Public Service Company has been accorded that protection under Arizona law. It is submitted here that if Arizona Public Service Company is raising a "substantive" due process challenge, that challenge is totally insubstantial. Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955).

CONCLUSION

On the basis of the points and authorities discussed herein, the appeal should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25 ~~24~~th day of May, 1976, three copies of the MOTION TO DISMISS AND BRIEF IN SUPPORT OF MOTION were mailed postage prepaid to SNELL & WILMER, Esquires, 3100 Valley Bank Center, Phoenix, Arizona 85073, Attorneys for Appellant.

I further certify that all parties required to be served have been served.

BRUCE E. BABBITT
Attorney General

/s/ JAMES D. WINTER
JAMES D. WINTER
Assistant Attorney General

Attorney for Appellees

Subscribed and sworn to before me this 25 ~~24~~th day of May, 1976.

/s/ Leone Hohman
Notary Public

My Commission expires:
3-19-80

reply brief

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Appellees.

On Appeal From Supreme Court of Arizona.

Brief of Appellant Opposing Appellees' Motion to Dismiss.

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Appellees.

On Appeal From Supreme Court of Arizona.

Brief of Appellant Opposing Appellees' Motion to Dismiss.

This brief of Appellant, Arizona Public Service Company ("APS"), in opposition to the Motion to Dismiss of Appellees (the "State") deals only with

the State's first argument, that the appeal of APS was not timely taken. The State's remaining two arguments do not squarely confront the constitutional issue raised in APS's Jurisdictional Statement, but attempt to gloss over it. As the Jurisdictional Statement shows, the constitutional issue is, and remains, unavoidable and substantial.

On the question of the timeliness of the appeal, the starting point is the general fundamental standard that an appeal may be taken only after a judgment becomes truly final, as to all parties and as to all issues, not merely as to some issue—even though the most important—and not merely as to federal or constitutional issues. *Gospel Army v. Los Angeles,* 331 U.S. 543 (1947); *Chicago G. W. R. Co. v. Basham,* 249 U.S. 164 (1919); *Parr v. United States,* 351 U.S. 513 (1956); *Market Street R. Co. v. Railroad Commission,* 324 U.S. 548 (1945). In the case last cited, this Court set forth this standard as follows:

> "It [the state court judgment] must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."
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> 324 U.S. at 551.

The salutary purposes of this rule, of course, are to avoid piecemeal interference by the Supreme Court with state court proceedings and to refrain from asserting jurisdiction until the controversy in the state court proceedings have been finally resolved. In the present case the state court proceedings were not completely concluded until entry of the judgment of the Superior Court, pursuant to the mandate of the Court of Appeals,

on March 4, 1976. The Notice of Appeal filed by APS on April 14, 1976 was filed well within the 90-day period following March 4.

However, the basic rule that there be total finality of the state court proceedings is subject to two qualifications. One—which is not here relevant—is that in some cases the Supreme Court will permit an earlier appeal, before the state court proceedings have been absolutely exhausted, if there is some practical and compelling justification to do so, such as an issue involving an important national policy which calls for immediate determination by the Supreme Court. *See, e.g., Mills v. Alabama,* 384 U.S. 214 (1966); *Miami Herald Publishing Co. v. Tormillo,* 418 U.S. 241 (1974); *Cox Broadcasting Corporation v. Cohn,* 420 U.S. 469 (1975).

The second qualification *is* a consideration in this case. It is not disputed that the time to take an appeal is considered to begin to run when the last *discretionary* act is performed by a court at the state court level, even though there may follow purely *ministerial* acts before the state court proceedings are technically completely final. *E.g.; Mower v. Fletcher,* 114 U.S. 127 (1885); *Rio Grande W. R. Co. v. Stringham,* 239 U.S. 44 (1915).

Under this second qualification, the action by the Superior Court of Maricopa County in entering final judgment on March 4th was a purely ministerial function. The Superior Court judge had no discretion other than to enter judgment in favor of the state pursuant to the mandate of the Court of Appeals.

What, then, was the last discretionary function performed at the state court level? This last discretionary function was performed on one of two dates, on Feb-

ruary 9, 1976, the date the Court of Appeals actually issued its mandate to the Superior Court, or possibly on the earlier date of January 30, 1976, when the Court of Appeals denied the motion of APS for the mandate of the Court of Appeals to permit APS to amend its complaint. The notice of appeal by APS, filed on April 14, 1976, was filed within 90 days of even this earlier date of January 30, 1976. Therefore, if the Court of Appeals exercised any discretion in passing upon the motion of APS requesting that the mandate to the Superior Court permit amendment of the APS complaint, this appeal was clearly timely.

The Court of Appeals in ruling upon the APS motion ruled adversely to APS, denying the motion. However, there is no question whatever but that the Court of Appeals in its ruling on the motion was not merely acting ministerially. It was exercising its discretionary and judicial function, passing upon a motion which was vigorously asserted and briefed by APS and just as vigorously contested and briefed by the State. That the Court of Appeals had authority, had it chosen, to rule in favor of APS to permit the requested amendment is amply supported by both Arizona and federal case authority, Arizona's Rules of Civil Procedure being substantially the same as the Federal Rules of Civil Procedure. For Arizona cases see *Frank v. Solomon,* 94 Ariz. 55, 381 P.2d 591 (1963); *Cagle v. Karr,* 101 Ariz. 225, 418 P.2d 381 (1966); *Harbel Oil Co. v. Steele,* 1 Ariz.App. 315, 402 P.2d 436 (1965);

and *County of Maricopa v. Chatwin,* 17 Ariz.App. 576, 499 P.2d 190 (1972). For federal cases see, *Sears, Roebuck & Co. v. Marhenke,* 121 F.2d 598 (9th Cir., 1941); *Negrich v. Hohn,* 379 F.2d 213 (3rd Cir., 1967); *Whitelock v. Leatherman,* 460 F.2d 507 (10th Cir., 1972).

It is particularly noteworthy that the *Chatwin* case was an ad valorem tax case in which a taxpayer challenged the correctness of tax classification and raised an issue of unconstitutional discrimination through an action for equitable or declaratory relief. The appellate court held that the complaint should have been dismissed because the taxpayer had an adequate remedy under the procedures of A.R.S. § 42-204 (the very code section in issue in this case). The mandate issued by the Court of Appeals in the *Chatwin* case specifically directed the trial judge to permit amendment of the complaint:

> "Upon remand, the respondent judge is directed to dismiss the original complaint and grant the respondent First National Bank's motion to file an amended complaint stating a claim for refund pursuant to the provisions of A.R.S. § 42-204, sub. sec. C and seeking only the relief provided for in that statute."
>
> 17 Ariz.App. at 584, 499 P.2d at 198.

In this case, the Court of Appeals chose not to authorize the trial court to permit amendment of the complaint, but in so doing it exercised a judgmental, non-ministerial, discretionary function. The time to take

this appeal began to run no earlier than January 30, 1976, the date on which the Court of Appeals denied the APS motion. Notice of appeal was filed within 90 days thereafter and the appeal is, therefore, timely brought before this Court.

Respectfully submitted,

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